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Supreme Court, U.S.
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NO. 86-1116

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SAMUEL LEWIS, et al.,

PETITIONERS,

-VS-

ANTHONY LEE CHANEY,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On October 8, 1985, Respondent, Anthony Chaney, filed his Petition for Habeas Corpus, Affidavit in Support of Motion to Proceed in Forma Pauperis, and Motion for Stay of Execution in the Federal District Court for the District of Arizona.

The Trial Judge, the late Walter E. Craig, on the same day in chambers during what counsel for both parties believed to be a hearing on the Motion for Stay of Execution, asked the Assistant Attorney General, William Schafer whether a hearing would be necessary.

Respondent had requested the District Judge to set the Petition for an Evidentiary hearing, to conduct a review of the record and to stay his execution pending the determination of the Petition.

The District Judge, in an informal and off-hand manner, asked Mr. William J. Schafer, III, Assistant Attorney General for the State of Arizona, counsel for Petitioner, whether a hearing was required. Mr. Schafer stated his opinion that a hearing was not necessary and that in his opinion the matter had been fully litigated in the State Court. The District Judge immediately, without offering an opportunity for rebuttal, announced that he was denying the Motion. Counsel for Petitioner briefly attempted to persuade the Court of the need for an evidentiary hearing and review of the record. The District Judge made it clear he was not interested. Both counsel were unsure of the parameters of the District Court's action until the following day, October 9, 1985.

The District Judge, in refusing to

examine the record, made no inquiry as to the location, availability or suitability of the State Court record in his oral refusal to consider that record.

On October 8, 1985, contrary to the implication of Petioner's Brief, the only official certified record of the proceedings in the State Courts was in the possession of the State of Arizona, having been lodged with the Arizona Supreme Court. Uncertified copies of most of the proceedings had been retained by or supplied to two different attorneys representing Petitioner at various stages. Some of those uncertified copies had been annotated, marked, or disassembled during the preparation of other proceedings and research by this counsel and by separate prior counsel appointed to represent Mr. Chaney on direct appeal.

Mr. Chaney was indigent at all relevant times, having been represented by appointed counsel at trial and appeal and by pro bono uncompensated counsel during post-conviction proceedings in the State Courts and in the District Court and the Ninth Circuit.

REASONS FOR DENYING THE WRIT.
PETITIONER REQUESTS THIS COURT TO
UNWISELY EXTRAPOLATE THE HOLDING OF
AUSTAD v. RISLEY

In Austad v. Risley, 761 F.2d 1348 cert. den.106 S.Ct. 814 (9th Cir. 1985) the Court of Appeals for the Ninth Circuit considered the effect of 28 USC Section 2254 (E).

Austad, a non-capital case, involved a Petition for Habeas Corpus. The Docket Sheet reflects that the State record considered by the Court was not tendered at the time of the filing of the Petition but was supplied by respondent State of Montana pursuant to Rule 5 of the Rules Governing Section 2254 cases. (Austad, supra Docket No. 83-3933).

Rule 5, and the procedure set forth therein clearly contemplates that the official certified copy of the record is in the possession of the State.

This Court, in Austad, at 761 F.2d 1351 remarked that Mr. Austad did not request the District Court to order the production of certain exhibits after the bulk of the transcript was produced by the State. Opportunity for such a request by the Respondent is contemplated and provided for in the express language of Rule 5.

> There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The Court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed be furnished.

Austad also pointed out that an alternative method of expanding the record would have been for counsel to have requested the Court to expand the record pursuant to Rule 7 of the Rules Governing 2254 cases.

In the instant case neither Respondent Chaney nor his counsel was afforded

the opportunities extended by Rules 5 and 7 to request the Court to order production. Counsel did have and only had the opportunity to request the District Court to conduct a review of the record. That Court, arbitrarily, capriciously and summarily declined and refused to do so.

Prior to filing the Petition for Habeas Corpus, the Respondent would have been foreclosed from moving for the production of the pre-existing certified records and transcripts. Cf. United States v. Losing, 601 F.2d 351 (8th Cir. 1979). Although Losing, supra, is a Section 2255 case, its determination rests on the interpretation of 28 USC Section 753 which also governs the production of transcripts and records for Section 2254 cases which provides that fees for transcripts in habeas corpus proceedings

shall be provided to persons allowed to proceed in forma pauperis. (28 USC Section 753 f.)

If counsel had presented or duplicated those portions of the uncertified copies of the State record available to him, Petitioner would have unnecessarily risked the question raised and then deemed waived by the State in Koski v. Samaha, 648 F.2d 790 (1st Cir. 1981).

In Koski, the Petitioner included affidavits and news clippings which were not part of the official record. The Court, sua sponte, questioned the appropriateness of considering such uncertified materials and then determined that the error had been waived.

This Respondent should not be required to guess at his peril whether the State or the Court may or may not object to an uncertified transcript which has been annotated, interlineated

and otherwise employed as a working tool by this counsel and by separate prior counsel when the regular reasonable and standard practice is to provide the State Court's certified copy to the Court. To require Respondent to furnish his working copy would have the additional unnecessary burden of depriving Respondent of effective assistance of counsel and due process by depriving him and his counsel of the necessary tools for reply and supplemental briefs, evidentiary hearings and arguments which are anticipated after the filing of a Petition.

We are not dealing here with the case of Austad in which a District Judge has failed to call, sua sponte, for more information to be produced from the State Court Record. Here we are confronted with a clear refusal of the District Judge to consider any

material. There is not even a showing that the District Judge even read the Petition for Habeas Corpus and/or the Motion to Conduct an Evidentiary Hearing.

RESPONDENT PROPERLY PRESENTED HIS CLAIM THAT HIS RIGHT TO A FAIR TRIAL UNDER AKE v. OKLAHOMA HAD BEEN DENIED

On Labor Day of 1982, Anthony Chaney killed a popular physician who was also a part-time sheriff's deputy in Coconino County, Arizona. Chaney's confrontation with the reserve sheriff's deputy was recorded over the open microphone in the deputy's vehicle. The confrontation, including the firing of approximately 30 rounds for an AR-15 rifle lasted approximately 12 seconds.

Chaney was captured a short time later and asked the arresting officer to beat him up or to kill him. The public, the press, the police agencies, and the trial court immediately assumed

him guilty, assumed him to be an aggravated killer, and prepared to "go through the motions" of a trial before the anxiously anticipated execution.

Approximately three weeks before trial, his trial counsel became aware of research done by a pioneering group of neuropsychiatrists and neuropsychologists into a rare and little-understood phenomenon which related to Mr. Chaney's otherwise inexplicable behavior which alternated from impulsive, foolish and occasionally dangerous actions to a more characteristic introspective, sensitive, genuinely remorseful, and self-reproaching nature.

Anthony Chaney sought, through counsel, but was never allowed, an adequate opportunity to collect and present evidence which would substantiate that he is one of those who suffers from an organic brain disorder which can be as terrifying and troubling to the sufferer as it is frightening and dangerous, when uncontrolled by

medication, to those about him.

Doctors Vernon Mark, Frank Ervin, and Leo Alexander, whose evaluations set forth a reasonable basis for further investigation and evaluation, are world-class experts and pioneers in neuropsychiatry. Dr. Frank Ervin is a Professor at McGill University in Montreal. While he and Dr. Mark were teaching at the Harvard Medical School, they collaborated and published the seminal work in the field, "Violence and the Brain," Harper and Row, 1970. Dr. Mark at the time of that publication was then Director, Neurosurgical Service, Boston Hospital, and an Associate Professor at Harvard Medical School. Dr. Ervin was then the Director of the the prestigious Stanley Cobb Laboratories for Psychiatric Research at Massachusetts General Hospital and an Associate Professor of

Psychiatry at Harvard Medical School. Dr. Leo Alexander, 77 years old at the time he testified, is one of the acknowledged pioneers in neuropsychiatry. His career included research and teaching at Harvard, Chief, Psychiatric Consultant to the Secretary of War during the Nurenburg war crimes trials, and consultant to the Boston Police Department during the Boston Strangler investigation. Dr. Mark's work received national recognition (and came to the attention of trial counsel) on the respected CBS documentary "60 Minutes" three weeks prior to Chaney's trial.

Even the State's "expert," Dr. Joseph White, acknowledged that he knew of the expertise of Dr. Ervin whom he had met at the UCLA Brain Center, where both were employed some 24 years previously and of Dr. Mark. Dr. White admitted on

cross examination that he had no professional interest or familiarity with the work which Drs. Mark and Ervin had accomplished in neuropsychiatry but that he knew and respected the work they had done in the field of pain, one of his own professional interests.

Drs. Mark, Ervin, and Alexander emphasized the need for certain neuropsychological tests and procedures to provide objective verification for their subjective clinical assessments. Counsel sought to have such tests provided for and sought to appoint experts with skill and training in the areas of neuropsychiatry and neuropsychology touching upon the Discontrol Syndrome. The trial court refused to provide for such tests or experts on the basis that the expense was too great and the burden of providing security was too great. Among the

tests which were requested and refused were a full neuropsychological battery including the Luria-Nebraska test, the Halstead-Reitan Test, pneumonencephalograms, a high resolution catscan performed on a GE-8-800 or better machine and multiple electrroencephalograms with naso-pharengeal leads inserted during the full test including sleep records and various activation records.

Over the weekend before trial in this matter, the prosecutors hired their own "expert," Dr. Joseph White, M.D., to conduct only some of the tests. Despite an agreement among counsel that defense counsel would be allowed to accompany Chaney for the prosecution tests, Mr. Chaney was prematurely and sureptitiously removed from the jail and subjected to incomplete test procedures by Dr. White. White advised

and assisted the prosecution in their attempts to convict the appellant. He was required to admit on cross-examination that his knowledge of the Discontrol Syndrome was confined to what he could recall of conversations which he had with the defense expert, Dr. Frank Ervin, in 1958 or 1959, that he considered the Discontrol Syndrome to be an area outside of his area of expertise and that "I can assure you I'm no authority..." Defense counsel, over objection, was required to begin trial, conduct voir dire, and make opening statements even before the results of such inadequate tests by the prosecution witness were available.

The scope and nature of the distinctions between the Discontrol Syndrome, and other related but distinguished areas of study which had been the subject of wider knowledge and research

among the medical professions was never comprehended by the State Courts nor considered even briefly by the District Court. As Dr. Frank Ervin set forth this disorder is apparently closely related to but not identical to classical temporal lobe epilepsy, is sometimes present in individuals who have classical temporal lobe epilepsy, and is also present in persons who have none or only some of the symptons of temporal lobe epilepsy.

Because of the State Court's insistence on a "rush to judgment," over objection, Mr. Chaney did not have access to the raw materials necessary to establish his sole defense nor did he have necessary and adequate assistance in evaluating, preparing, and presenting a defense or cross-examining and challenging the experts of the prosecution.

Dr. Leo Alexander, one of the pioneers in neuropsychiatric research for over 50 years was, by coincidence, in Tucson recuperating from painful hip surgery shortly before trial. Despite his advanced age, pain, the side effects of strong medication which made him physically ill, and problems with the high elevation of Flagstaff, Arizona, he attempted to provide assistance to the defense. That fine and gracious gentleman and scholar made a critical and inadvertent error in the unfamiliar notation of the prosecutor's inadequate electroencephalogram record which was not available to the defense until the midst of the trial. An opportunity for a complete examination or for an independent examination and adequate preparation would have prevented such a devastating setback.

One of the trial jurors, in a

post-verdict interview, stated that she did not beleive that Drs. Ervin and Alexander had done enough tests. The Trial Court and the Arizon a Supreme Court refused to allow her to be examined regarding such conclusion in Chaney's effort to gain a new trial. The District Court refused to examine the record of such determination.

Mr. Chaney was sentenced to death solely on the basis of a single statutory aggravating factor set forth in 13 A.R.S. Section 703(F) (6). The Trial Court found that murder was "cruel, heinous and depraved."

Mr. Chaney had a history of moderate property crimes, bad checks, and theft, including the transportation of a relative's car across a state line. At trial it was uncontested that he and Deanna, whom he had invalidly married in reliance on his former spouse's

representation that she was obtaining a divorce, had burglarized several homes of such items as canned corn, bread, salad dressing, meat, and other food stuffs. Upon burglarizing one home in Texas for food, they inadvertently came upon the home of a major drug dealer. Chaney and Deanna took the weapons, including the fateful AR-15, from that home. They also impulsively stole a distinctive dual-wheeled pick-up truck with personalized license plates.

Chaney had no previous convictions for violent crimes. Investigation and testimony established that he had experienced a number of somewhat violent incidents, understandably frightening to those who were the objects or observers. Consistent with a diagnosis of Discontrol Syndrome, the prior incidents of violence were of short duration, ranging from

periods measured in seconds to some lasting a minute or more. Typically, he would be apologetic and often tired immediately after such incidents. Significantly, none of the prior incidents ever lasted long enough for anyone to be injured. For some of the incidents he has no memory, for others he has a memory and questions to which he had no answers until the diagnosis of Discontrol Syndrome was made. He shows a history of introspection, confusion, and sensitivity which is summed up in the opening sentence of a poem he had sent to his mother long before Labor Day, 1982:

"My thoughts control my actions, but what controls my thoughts?"

His writings indicated he was troubled about why he was sporadically unable to avoid doing bad and impulsive things.

The District Court improperly refused

to examined the State Court Record on the fact-intensive claim that he was prejudiced unconstitutionally by the State Court's denial of his reasonable and necessary requests for diagnostic medical tests, for preparation time, and for assistance necessary for the effective presentation of his insanity defense.

The State of Arizona alleged that since the appellant was seen by physicians, that since physicians testified in his trial, and that he received some of the diagnostic tests requested, that the strictures of Ake v. Oklahoma, 470 U.S. _____, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) either do not apply or were met. It is much the same argument which the State of Alabama unsuccessfully urged in Powell v. Alabama, 287 U.S. 45, 59, 53, S.Ct. 55, 77 L.Ed. 159 (1932). In Powell,

the State of Alabama and the dissent claimed that since the trials of the "Scottsboro Boys" had proceeded with counsel and such counsel had struggled zealously despite such handicap, there was no constitutional infirmity. The majority held that "the law of the land" is "a law which hears before it condemns," (287 U.S. at 68) and that to be stripped of the time to prepare "is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." 287 U.S. at 59.

This reasoning of Powell v. Alabama, supra, is one of the foundations of Ake v. Oklahoma, supra and Ford v. Wainwright, 477 U.S. _____, 91 L.Ed 2d 335, 106 S.Ct.____ (1986).

When counsel first became aware, three weeks before trial, that an issue of a psychoneurological disability was

an issue, he sought a reasonable continuance as well as specific tests. Those requests were denied.

When the State, on the weekend before the trial, arranged for its own expert to conduct some of the tests requested by the appellant, this Respondent again requested a short continuance so that the results of those test would be available to counsel in forming voir dire, make an opening statement, and formulate trial strategy and cross-examination without access to the results of Dr. White's incomplete tests.

Respondent was damaged by the refusal of the State Court to allow him time to prepare and present his defense and prepare cross-examination of witnesses, especially during the crucial first week of trial.

The Discontrol Syndrome is an

epileptoid disorder, similar in some respects, different in others, from classical and more familiar forms of epilepsy. Because of their very nature, epileptoid disorders are intermittent disorders, and because they can sometimes be triggered by various stressors or activators, the appellant sought to have a series of electroencephalograms performed and to have more sensitive naso-pharangeal leads inserted during all such examinations. The prosecution's witness, Dr. White, did not utilize nasopharangeal leads inserted during all such examinations. The prosecution's witness, Dr. White, did not utilize naso-pharangeal leads during the sleep recordings or during the photic stimulation recordings. An independent review of the State Court record would estalbish that it is as if an automobile mechanic

with a diagnostic machine searching for an intermittent defect in an auto voltage regulator were tohook up the leads to all the other electrical components, starter, distributor, coil, etc., and then to give the voltage regulator a clean bill of health.

Rather than using the more sensitive GE-8-800 catscan as he had assured, White utilized an older, less sensitive model which was deliberately set at less than its optimum resolution to save time and expense. This was critical because of the lesions which may cause the Discontrol Syndrome are often smaller than the resolving capacity of even the most sophisticated non-invasive instruments.

The Ninth Circuit, in interpreting Ake, was held that it "requires states to provide indigent defendants with

access to competent psychiatric assistance to aid in defense preparations," U.S. v. Flynt, 756 F.2d 1352, 1361 (9th Cir. 1985). The Eleventh Circuit holds that the constitutional right to psychiatric assistance encompasses psychiatric examination and opinion "developed in a manner reasonably calculated to allow adequate review of relevant, available information." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985), cert. denied, 54 106 S.Ct. 374 (1985).

In Blake, supra, a court appointed psychiatrist was unable to give an opinion as to the defendant's sanity, because he was not provided with sufficient information. Although the court could not determine whether the psychiatrist, had he been given such information, would have determined the defendant was insane, the court

held that the failure to provide the information mandated habeas relief. By failing to provide the psychiatrist with complete information upon which he could base his opinion as to defendant's mental status, the State of Georgia in Blake failed to assure him "a fair opportunity to present his defense." 758 F.2d at 530.

The State Court's denial of appellant's request for medical tests after trial and prior to sentencing also violated his Fifth, Sixth, and Eighth Amendment rights by depriving him of significant mitigating evidence despite his constitutional entitlement due to process, equal protection, and effective assistance of counsel.

Thus an independent review of the State Court record would establish that Respondent did not have access to the raw materials necessary to establish

and effectively present his sole defense, nor did he have necessary and adequate assistance in evaluating, preparing, and presenting a defense or cross-examining and challenging the "experts" of the prosecution as he is entitled to by Ake v. Oklahoma, supra, Ford v. Wainwright, 477 U.S. _____, 91 L.Ed2d 335, 106 S.Ct _____ (1986), United States v. Bass, 477 F.2d 723 (9th Cir. 1973), United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975), United States v. Sloan, 776 F.2d 926 (10th Cir. 1985), United States v. Crews, 781 F.2d 826 (10th Cir. 1986).

In Sloan, supra, a non-capital case, the court determined that when a defendant makes a preliminary showing that his sanity is likely to be a "significant factor," access to aid for the defense is mandated by the Constitution even if doctors are appointed by

the court whose opinion supports the State's position.

Review of the record will establish that when the State Court refused to appoint experts in neuropsychiatry familiar with the Discontrol Syndrome, counsel, at his own expense, arranged for Drs. Ervin and Alexander to provide the limited assistance obtainable in view of the hostile attitude of the state trial judge and to make a record of what should have been done. When the court attempted to preclude even this limited testimony from the physicians, unless they were produced seven days before trial (a logistically and financially insuperable burden), counsel offered to send the County Attorney or his agent at his expense to the East coast for such consultation.

Although counsel and the doctors did the best they could within the con-

straints of a hostile court determined to charge forward in a rush to a fore-ordained conclusion, an independent review of the record will establish that appellant did not receive the due process, the equal protection, and the effective assistance of counsel to which he is entitled.

CONCLUSION

The State of Arizona has expended for more judicial effort and prosecutorial effort in attempting to prevent the presentation of Petitioner's defenses than would have been consumed in a fair hearing.

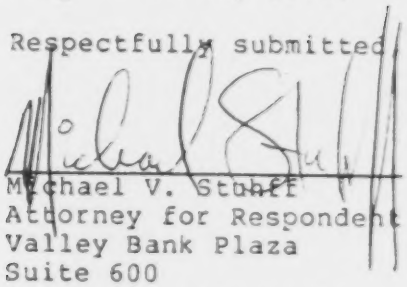
It is easy for Courts to become cynical and jaded just as it is for attorneys and the public. For our system to work, the accused must have a meaningful opportunity to collect and present evidence to a forum that is willing to listen before imposing judgment.

That is not too high a price to pay for civilization. It is a price that our society and this Court have determined must be paid. The State of Arizona should fail in its attempt to persuade this Court to repudiate the principles of fairness set forth in Ake

v. Oklahoma, supra and Ford v. Wainwright. The State of Arizona unwisely requests this Court to stretch the holding of Austad v. Risley, supra beyond its facts, beyond the clear intent of the Rules for Section 2254 actions and beyond the regular practice in virtually all Section 2254 actions arising from Arizona prior to this. The State of Arizona presents no reasons sufficient under Rule 17 of this Court for such a radical departure from the well-established and well reasoned policy of this Court favoring determination of ultimate issues of guilt or innocence on the merits after the presentation of all relevant evidence.

Dated this 27 day of March, 1986.

Respectfully submitted,



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AFFIDAVIT

Washington)
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Michael V. Stuhff, a member of the bar of this Court, being duly sworn upon oath, deposes and says.

That he has served three copies of the Brief of Opposition to the Petition for Writ of Certiorari upon Crane McClennen, Assistant Chief Counsel, Department of Law, 1275 West Washington, Phoenix, Arizona 85007, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail with first class postage prepaid, addressed to the Solicitor

General, Department of Justice, Washington, D.C. 20530.

Dated this 27 day of March, 1987.

Michael V. Stuhff

Subscribed and sworn to before me this 27th day of March, 1987.